Penerbitan Pelangi Sdn Bhd v Pan Alliance Sdn Bhd and other actions

HIGH COURT (KUCHING) — SUITS NO 22-88-95-I, 52-334-96-II AND 52-310-95-II
IAN CHIN J
7 OCTOBER 1999

Contract *— Termination — Distribution agreement — Termination based on non compliance before last day for completion of contract — Whether valid — Whether distribution of goods after termination contrary to distribution agreement valid*

Contract *— Termination — Distribution agreement — Summary termination of contract — Agreement provides for termination by notice — No breach proved — Whether termination valid — Whether distribution of goods after termination contrary to distribution agreement valid*

Penerbitan Pelangi Sdn Bhd ('Pelangi') had obtained the exclusive right to distribute multimedia packages relating to teaching material for children ('the products'). Pelangi entered into a distribution agreement dated 1 October 1994 with Pan Alliance Sdn Bhd ('Alliance'). During the month of August 1994, Pelangi dealt with Sinar Suci Sdn Bhd ('Suci') and Syarikat Dewan Pustaka Setia ('Dewan') concerning the supply of the products to the Education Department in the event of a succesful tender by the two entities. The products were delivered by Pelangi in November 1994. On 29 April 1995, Pelangi wrote to Alliance stating that Alliance had breached certain clauses of the distribution agreement and gave four months' notice as required by cl 8 of the agreement to Alliance terminating the agreement. One of Pelangi's allegations against Alliance was that Alliance had failed to reach a minimum sales and/or purchase as stipulated in cl 2(e) of the agreement. According to cl 2(e), Alliance agreed to make a minimum quantity of purchases of 7,000 packages within the first year. Alliance's counterclaim and claims against Pelangi were, inter alia: (i) terminating prematurely the distribution agreement; (ii) failing to supply authority card required by the Direct Sales Act 1993; and (iii) supplying the products to the Education Department, Suci and Dewan at a discount price.

Held:

(1) Throughout the distribution agreement, the emphasis was on a minimum quantity of sales. There was no time limit set in which each order placed by Alliance must be made by Pelangi. Looking at the surrounding circumstances and at the whole of the distribution agreement, cl 2(e) did not prohibit bulk order in a single order. This means that Alliance had the right to order the whole quantity of the products in the twelfth month of the first year or in any previous month. This means too that when considering whether Alliance had breached cl 2(e), the last day for

compliance was the last day of the twelfth month of the currency of the distribution agreement and not at the time of the termination letter, ie 29 April 1995, where only seven months had elapsed (see pp 385A–B, 386A–B). A

(2) The distribution agreement provided for summary termination of the distribution agreement under cl 7 and for termination with four months' notice under cl 8(1). The April 29 letter relied on the alleged breaches as well as on the notice for termination. The intention of Pelangi was made very clear that they were exercising their right, rather than waiving their right, under cl 8(1) to terminate the distribution agreement by notice. Therefore, though the alleged breaches could not be established, nevertheless the distribution agreement was lawfully terminated by Pelangi giving four months' notice under cl 9(1). The distribution agreement came to an end on 29 August 1995 (see pp 387A–B, 387H–388A). B C

(3) Pelangi was in breach of the distribution agreement when it failed to supply the authority cards to Alliance for six persons as requested by Alliance. Therefore, whatever damage suffered would be the result of the failure to issue the cards to the six persons. However, Alliance failed to produce evidence what sales these six persons could have procured if the cards had been issued to them. Consequently, Alliance failed in this counterclaim (see p 389B–F). D E

(4) Since the sale to the Education Department took place on 13 November 1995 which was after the distribution agreement was validly terminated on 29 August 1995, this claim must fail since Alliance could not claim any right under the distribution agreement after it was lawfully terminated and the supply of the products at a discount was after the distribution agreement had ended (see p 389H–I). F

(5) The sales to Suci and Dewan were pursuant to tenders which were called for on 1 August 1994 but acceptance of the tenders of these two entities was only conveyed to them on or after 1 November 1994. That would be the date that a contract was concluded. By cl 5 of the distribution agreement, either party would have to pay the other if a sale of the products was at a discount and an amount equivalent to the discount should be paid by the offending party to the other. Alliance lost the opportunity to supply the products to the two entities. Though it was argued that the two entities would not have bought the products at the prices which Alliance was obliged to sell and thus Alliance would not derive any profit, there was no evidence to support that contention. There was nothing to prevent the two entities tendering at a higher price if Pelangi or Alliance had quoted the products to them at the non-discount prices. If Pelangi had not given any discount, both Pelangi and Alliance would have the opportunity of securing the contract to supply to the two entities (see pp 390B, 391A, F–H). G H I

(6) Therefore, it could be said that Alliance had lost the opportunity but since a sum had been stipulated in cl 5 as being payable in the event of its breach and that sum being lower than would otherwise have been the loss of profit, Alliance was only entitled, under s 75 of the Contracts Act 1950, to the stipulated sum which worked out to be RM50,730 being the amount of the discount allowed by Pelangi and which Pelangi had to pay to Alliance under cl 5 (see pp 391H–392A).

(7) As for the damage, Alliance had lost the opportunity to sell and profit from such sale. However, the loss was not the amount stated in cl 5. Alliance was obliged to obtain the products at prices fixed under the distribution agreement and to sell also at fixed prices. Thus the difference between the two would constitute the damage Alliance had suffered (see p 392A–B).

[Bahasa Malaysia summary

Penerbitan Pelangi Sdn Bhd ('Pelangi') telah memperolehi hak eksklusif untuk mengedarkan bungkusan-bungkusan multimedia berkenaan dengan bahan pengajaran untuk kanak-kanak ('hasil-hasil keluaran'). Pelangi memasuki suatu perjanjian pengedaran bertarikh 1 Oktober 1994 dengan Pan Alliance Sdn Bhd ('Alliance'). Pada bulan Ogos 1994 Pelangi berurusniaga dengan Sinar Suci Sdn Bhd ('Suci') dan Syarikat Dewan Pustaka Setia ('Dewan') berkenaan bekalan hasil-hasil keluaran kepada Jabatan Pendidikan jikalau terdapat suatu tender yang berjaya oleh kedua-dua entiti-entiti tersebut. Hasil-hasil keluaran telah dihantar oleh Pelangi pada November 1994. Pada 29 April 1995, Pelangi menulis kepada Alliance menyatakan bahawa Alliance telah memungkiri fasal-fasal tertentu perjanjian pengedaran tersebut dan memberikan empat bulan notis seperti yang diperlukan di bawah fasal 18 perjanjian tersebut kepada Pelangi untuk menamatkan perjanjian tersebut. Salah satu daripada pengataan Pelangi terhadap Alliance adalah bahawa Alliance telah gagal mencapai jualan dan/atau pembelian minima seperti yang ditetapkan di bawah fasal 2(e) perjanjian tersebut. Mengikut fasal 2(e), Alliance bersetuju membuat pembelian-pembelian kuantiti minima sebanyak 7,000 bungkusan-bungkusan dalam tahun pertama. Tuntutan balas Alliance dan tuntutan-tuntutan terhadap Pelangi adalah, antara lain: (i) menamatkan secara pramasa perjanjian pengedaran tersebut; (ii) gagal membekalkan kad kuasa yang diperlukan oleh Akta Jualan Langsung 1993; dan (iii) membekalkan hasil-hasil keluaran kepada Jabatan Pendidikan, Suci dan Dewan pada harga diskaun.

Diputuskan:

(1) Sepanjang perjanjian pengedaran tersebut, penekanan adalah berkenaan dengan jualan kuantiti minima. Tiada terdapatnya had masa ditetapkan atas mana setiap pesanan yang dibuat oleh

Alliance mesti dibuat oleh Pelangi. Melihat kepada keadaan-keadaan sekeliling dan keseluruhan perjanjian pengedaran tersebut, fasal 2(e) tidak melarang pesanan pukal dalam satu pesanan. Ini bermakna bahawa Alliance mempunyai hak untuk memesan keseluruhan kuantiti hasil-hasil keluaran dalam bulan kedua belas tahun pertama atau dalam mana-mana bulan sebelumnya. Ini bermakna juga bahawa apabila mempertimbangkan sama ada Alliance telah memungkiri fasal 2(e), hari terakhir untuk pematuhan adalah hari terakhir bulan kedua belas berkuatkuasa perjanjian pengedaran tersebut dan bukan pada masa surat penamatan, ie 29 April 1995, di mana hanya tujuh bulan telah berlalu (lihat ms 385A–B, 386A–B).

(2) Perjanjian pengedaran tersebut mensyaratkan penamatan terus perjanjian pengedaran tersebut di bawah fasal 7 dan untuk penamatan dengan empat bulan notis di bawah fasal 8(1). Surat April 29 bergantung kepada kemungkiran-kemungkiran yang dikatakan dan juga tentang notis penamatan. Niat Pelangi adalah amat jelas bahawa mereka menggunakan hak mereka, daripada mengenepikan hak mereka, di bawah fasal 8(1) untuk menamatkan perjanjian pengedaran tersebut melalui notis. Maka demikian, walaupun kemungkiran-kemungkiran yang dikatakan tersebut tidak dapat dibuktikan, namun perjanjian pengedaran tersebut adalah ditamatkan secara sahnya oleh Pelangi dengan memberikan empat bulan notis di bawah fasal 9(1). Perjanjian pengedaran tersebut tamat pada 29 Ogos 1995 (lihat ms 387A–B, 387H–388A).

(3) Pelangi memungkiri perjanjian pengedaran tersebut apabila ia gagal untuk membekalkan kad-kad kuasa kepada Alliance untuk enam orang seperti yang diminta oleh Alliance. Maka apa-apa kerosakan yang dialami adalah hasil kegagalan untuk mengeluarkan kad-kad tersebut kepada enam orang. Walau bagaimanapun, Alliance gagal untuk mengemukakan keterangan tentang jualan yang boleh didapati jika kad-kad tersebut telah dikeluarkan kepada mereka. Akibatnya, Alliance gagal dalam tuntutan balas ini (lihat ms 389B–F).

(4) Oleh sebab jualan kepada Jabatan Pendidikan berlaku pada 13 November 1995 iaitu setelah perjanjian pengedaran tersebut telah ditamatkan secara sahnya pada 29 Ogos 1995, tuntutan ini mesti gagal memandangkan Alliance tidak boleh menuntut apa-apa hak di bawah perjanjian pengedaran tersebut setelah ia ditamatkan secara sahnya dan pembekalan hasil-hasil keluaran pada diskaun adalah selepas perjanjian pengedaran tersebut telah berakhir (lihat ms 389H–I).

(5) Jualan kepada Suci dan Dewan adalah menurut tender-tender yang dipanggil pada 1 Ogos 1994 tetapi penerimaan tender-tender kedua-dua entiti-entiti tersebut hanya disampaikan kepada mereka pada 1 November 1994. Itu adalah tarikh di mana suatu kontrak mengikat. Menurut fasal 5 perjanjian pengedaran

tersebut, mana-mana pihak dikehendaki membayar pihak yang satu lagi jika jualan hasil-hasil keluaran adalah pada diskaun dan suatu jumlah yang sama kepada diskaun seharusnya dibayar oleh pihak yang menyinggung kepada pihak yang satu lagi. Alliance telah kehilangan peluang untuk membekalkan hasil-hasil keluaran kepada kedua-dua entiti tersebut. Walaupun dihujahkan bahawa kedua-dua entiti tersebut tidak akan membeli hasil-hasil keluaran pada harga-harga atas mana Alliance diwajibkan untuk menjual dan maka Alliance tidak akan mendapat apa-apa keuntungan, tiada keterangan untuk menyokong pendapat tersebut.Tiada apa-apa yang menghalang kedua-dua entiti tersebut untuk memberikan tender pada harga yang lebih tinggi jika Pelangi atau Alliance telah menyebut hasil-hasil keluaran kepada mereka pada harga tanpa diskaun. Jika Pelangi tidak memberikan apa-apa diskaun, kedua-dua Pelangi dan Alliance akan mempunyai peluang memperolehi kontrak tersebut untuk membekal kepada kedua-dua entiti tersebut (lihat ms 390B, 391A, F–H).

(6) Maka ia boleh dikatakan bahawa Alliance telah kehilangan peluang tetapi memandangkan suatu jumlah telah ditetapkan dalam fasal 5 sebagai yang kena dibayar dalam keadaan kemungkiran dan bahawa jumlah tersebut adalah kurang daripada apa yang sebaliknya merupakan kehilangan keuntungan, Alliance cuma berhak, di bawah s 75 Akta Kontrak 1950, kepada jumlah yang ditetapkan yang berjumlah RM50,730 yang merupakan jumlah diskaun dibenarkan oleh Pelangi dan yang mana Pelangi mesti membayar kepada Alliance di bawah fasal 5 (lihat ms 391H–392A).

(7) Berkenaan dengan kerosakan, Alliance telah kehilangan peluang untuk menjual dan memperolehi keuntungan daripada jualan sedemikian. Walau bagaimanapun, kerugian tersebut bukannya jumlah yang dinyatakan dalam fasal 5. Alliance adalah diwajibkan untuk memperolehi hasil-hasil keluaran pada harga-harga yang ditetapkan di bawah perjanjian pengedaran tersebut dan menjual juga pada harga tetap. Maka perbezaan di antara kedua-duanya akan merupakan kerosakan yang dialami oleh Alliance (lihat ms 392A–B).]

Notes

For cases on termination of agreement, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2999–3008.

Cases referred to

Chaplin v Hicks [1911] 2 KB 786 (refd)

Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd [1994] 1 MLJ 553 (refd)

Mohamad Selan v PB Secuirities Sdn Bhd [1992] 1 MLJ 762 (refd)

Prenn v Simmonds [1971] 3 All ER 237 (refd) A
Reardon-Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989 (refd)
Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (refd)
Syarikat Sinar Sahabat v Nam Thye Co (LD) Sdn Bhd [1995] BLJ 60 (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633 (refd) B

Legislation referred to

Contracts Act 1950 s 75 C
Direct Sales Act 1993 s 18

Kilat Beriak (*Chew Jugah Wan Ullok & Co*) for the plaintiff.
Baru Bian (*Baru Bian & Co*) for the defendant.

Ian Chin J: D

Introduction

These actions involving the same parties Penerbitan Pelangi Sdn Bhd ('Pelangi') and Pan Alliance Sdn Bhd ('Alliance') were tried together. The High Court action will be referred to as Suit 88 while the two lower court E actions will be referred to respectively as Summons 310 and Summons 334. All the actions allege breach of a distribution agreement dated 1 October 1994 by one or the other party and claim damages.

The claims and counterclaims F

Pelangi alleged that Alliance breached the distribution agreement by: (1) failing to provide quarterly report after requests made by Pelangi; (2) failing to reach a minimum sales or purchase; and (3) failing to provide particulars of potential customers. A fourth allegation of breach was, in the course of the trial, abandoned and I will not concern myself with it. Pelangi claimed loss of profit in the sum of RM1,019,410.48. Another issue to be G resolved is whether the distribution agreement can be terminated by giving four months' notice.

Alliance's counterclaim and claims against Pelangi are that Pelangi had breached the distribution agreement in: (1) terminating prematurely the distribution agreement; (2) failing to supply the authority card required by H the Direct Sales Act 1993; (3) 'changing the packaging contents midstream' causing 'lots of difficulties' in Alliance's market strategy; (4) supplying to the Education Department through Hung Tat Bookshop Sdn Bhd 330 units of Magic Box Pack 2 at a discount price of RM335 per pack; (5) supplying to Sinar Suci Sdn Bhd 285 units of Magic Box Pack 1 at a discount price of RM338 per unit; and (6) supplying to Dewan Pustaka I Setia 285 units of Magic Box Pack 2 at a discount price of RM438. Alliance claims damages of RM9,058,076, RM66,000, RM50,730 under the three actions.

Facts of case

This case concerns the sale of two types of multi-media packages relating to teaching material for children. They are called respectively Magic Box Pack 1 and Magic Box Pack 2 ('the products'). Pelangi had obtained the exclusive right to distribute the same in Malaysia by virtue of an agreement it entered into with Magic Box Distribution (Asia) Ltd on 20 December 1993. Pelangi in turn entered into the said distribution agreement with Alliance on 1 October 1994.

The relevant provisions of the distribution agreement which the parties had entered into are these (with Pelangi referred therein as 'the company' and Alliance as 'the agents'):

2 (a) The company hereby appoints the agents as its sole and exclusive distributor for the resale of the Goods in the agency district and the agent agrees to act in that capacity, upon the terms and conditions of this agreement for a period of two (2) years subject to such prior determination or termination as provided for and contained herein or by MBDL in respect of the company's distributorship.

(b) Subject as provided in Clause 2(d), the agents shall be permitted to appoint other persons, firms or companies in the agency district as a sub-distributor for the Goods in the agency district.

(c) The agents shall be entitled to describe itself as the company's 'Authorized Selling agents or Stockist' for the goods and to use the company's name and Direct Sales License No AJL 93565 purely for the selling of the goods and shall not hold itself out as being entitled to bind the company in any way whatsoever Provided Always that the agents shall at all times maintain the good name and integrity of the company and shall fully indemnify the company for any acts or omissions on its part and the agents undertake to immediately cease to use the company's name upon any requests being made by the company or any of its officers, provided that the company shall issue, prepare and endorse the necessary authority cards pursuant to Direct Sales Act 1993.

(d) The agents shall prior to appointing others to represent them ensure that these persons, firms of companies will maintain the good name and integrity of the company and the agents shall be fully responsible for and shall indemnity the company for any acts or omissions on the part of such appointed persons firms or companies.

(e) The agents agree to make the following minimum quantity of purchases from the company and to provide a sales report without any delay every three months

Period	Minimum Quantity
Within 1st year	7,000 Pack I & 7,000 Pack 2
Within 2nd year	12,000 Pack I & 12,000 Pack 2

It is agreed that an initial minimum order of 100 units of Packs I & 2 (combined) shall be placed and that each of the subsequent orders shall be in quantities of at least 100 units of Packs I & 2 (combined).

(f) Subject to the meeting of the aforesaid minimum target, the company agrees to provide a fresh appointment as their main distributors for future products of MBDL to be sold to the agents.

3 The agents hereby undertake and agree with the company that they will at all times during the continuance in force of this agreement observe and perform the terms and conditions set out in this agreement and in particular —

(a) will use their best endeavours to promote and extend the sales of the goods throughout the agency district to all potential purchasers thereof and work diligently to obtain orders therefor and to provide back-up and consultancy services to the agents'customers.

(b) will in all matters act loyally and faithfully to the company and obey its orders and instructions and in the absence of any such orders or instructions in relation to any particular matter will act in such manner as they reasonably consider to be most beneficial to the company's interests.

(c) will not engage or be interested either directly or indirectly as principal agent or employee in selling goods of any description or kind similar to those of the company or designed to perform the like functions as those of the company whether alone or in conduction with any other goods without obtaining the previous consent in writing of the company.

(d) will not sell to any person (or body corporate or unincorporate) goods which they know or have reason to believe are intended for resale outside the agency district.

(e) will not sell the goods to any person (or body corporate or unincorporate) except at the full list price, namely Pack I for RM399 and Pack 2 for RM555 without providing for any discounts in any form.

(f) will not in selling the goods make any representations or give warranties other than those contained in the company's Positions of sale (if applicable).

(g) will refer to the company all inquiries for the company's goods from addresses outside the agency district and from addresses in the agency district for resale outside that district and the agents shall not be entitled to any remuneration in respect of any sales resulting from any such inquiries.

(h) will promptly bring to the notice of the company any information received by them which is likely to be of use or benefit to the company in marketing the goods and will in particular provide the company with a data base of customers who have made purchases, on a monthly basis and such sales projection answers or information as may be requested by the company and/or MBDL from time to time.

(i) will keep full and proper books of account and records showing clearly all inquiries transactions and proceedings relating to the agency and in particular all transactions undertaken by or through the agents in reaction to the goods such books and records being separate from those relating to the goods such books and records being separate from those relating to matters not relating to the agency and remaining at all times the property of the company.

(j) will allow the authorised officers of the company at all reasonable times to have access to the agents'premises for the purpose of inspecting the said books and records and for the purpose of taking stock of the company's goods on those premises.

(k) will on a quarterly-year basis or upon the written request of the company supply to the company reports returns and other information relating to sales of the agency.

(l) will not alter remove or tamper with the marks or numbers on the goods deposited with them by the company.

(m) will not incur any liability on behalf of the company or in any way pledge or purport to pledge the company's credit.

(n) will in all correspondence commercial documents and on the name plate or other signs at their place of business describe themselves as selling agents or stockist for the company and will not describe themselves as the company's agents except in conduction with the word 'selling'.

(o) will within seven (7) days of signing this agreement present asatisfactory marketing Plan to the company.

4 The company hereby agrees with the agents that it will during the continuance of this agreement —

(a) its own expense supply the agents with 1,000 copies of promotion leaflets with a view to promoting sales of the products within the agency district and shall charge the production cost price of subsequent copies.

(b) provide a two months' guarantee from the date of delivery to the agents' ustomers against any faulty or defective parts of the Goods.

(c) provide sales kit to the agents at a cost of RM20 per kit.

(d) provide two training sessions and four workshops without labour charges subject to the agents paying for such cost of travel tickets, lodging, meals, staff allowance and all other expenses.

(e) charge a fee of RM300 plus all expenses including out-of-pocket expenses for any subsequent session(s) to be held at the agent's premises should such session(s) be requested for by the agents.

(f) will bear the cost of shipment for orders of the goods in quantities of not less than 100 packs for each shipment in respect of deliveries at Sibu, Miri, Kota Kinabalu and Kuching.

5 The company reserves to itself the rights notwithstanding anything to the contrary herein contained —

(a) to continue to sell and supply the goods to the customers in the agency district for purchases through co-operatives or under circumstances where the payments are through deductions (eg Angkasa, Moccis Trading, etc) and for all Governmental or Ministry purchases and no right to commission shall accrue to the agents in respect of any such sale provided that the selling price must be identical to those sold within the agency district by the agents. In the event that the company or the agents sell the goods at a discount, such damages at an amount equivalent to the discount given shall be credited or paid to the agents or the company, as the case may be. For the avoidance of doubt, it is hereby declared and declared that both the company and the agents are permitted to sell and supply the goods to the customers in the agency district from KOPERKASA, Government clubs and Bank Simpanan Nasional.

(b) if in the opinion of the company the agents are not at any time producing adequate sales coverage throughout the whole of the agency district and without prejudice to any other of its rights under this agreement either to vary the extent of the agency district so as to exclude from this agreement such part of parts of that district as it

thinks fit save that such course of action shall not be taken without prior consultation with the agents

6 (a) In consideration for their services to the company in pursuance of this agreement the agents shall be allowed to deduct and retain a fifty (50%) per cent off the full list price of the goods sold by them on behalf of the company.

(b) The agents shall pay for in cash the initial order mentioned in Clause 3(e) herein and shall (subject to the overiding discretion of the company) be permitted to pay for the part of the subsequent orders, being seventy (70%) per cent of the value of the order by way of a ninety (90) day term irrevocable documentary letter of credit and the balance thirty (30%) per cent being by way of cash.

7 Without prejudice to any other remedies the company may have against the agents the company shall have the right at any time by notice in writing to the agents to terminate the agreement forthwith in any of the following events —

(a) if the agents commit a breach of any of the terms or conditions of this agreement.

(b) if the agents enter into liquidation whether compulsorily or voluntarily (otherwise than for the purposes of amalgamation or reconstruction) or compound with their creditors or take or suffer any similar action in consequence of debt or in the case of an individual or a partnership, if the agents or any of the members of the firm become insolvent or enter into any arrangement with their creditors or take or suffer any similar action in consequence of debt.

(c) if from any cause not attributed to the conditions of goods or the company's failure to renew the Direct Sales License No 93565 the agents are prevented from performing their duties, hereunder for a period of three (3) months or for a total period of three (3) months in any one period of twelve calendar months.

(d) if the agents are guilty of any conduct which in the opinion of the company is prejudicial to the company's interest.

(e) if the agents purport to assign the burden or benefits or charge the benefits of this agreement without the consent in writing of the company.

8 (1) Either party may terminate this agreement at any time by giving to the other party four (4) month's notice in writing sent by registered post or recorded delivery service to the registered office of the company or he agents as the case may be.

(2) If at any time before the date of expiry of this agreement the company shall cease to carry on business or shall cease to deal in the Goods this agreement shall forthwith terminate.

9 The agents hereby undertake that they will not —

(1) at any time whether during the continuance in force of this agreement or at any time after the termination thereof divulge any information in relation to the company's affairs or business or method of carrying on business.

(2) during the period of one (1) year after the determination of is agreement for any reason whatsoever be associated whether as principals agents or employees in the manufacture sale or distribution in the manufacture sale or distribution in the agency district of any products of a like or similar kind to or designed to perform functions like or similar to the products of the company of

which the agents are or any time selling agents under this agreement without the prior consent in writing to the company.

10 (a) Upon the termination of this agreement from any cause or at any time previous to such termination at the request of the company the agents shall promptly return to the company or otherwise dispose of as the company may instruct all samples patterns instruction books technical pamphlets catalogues advertising material specifications and other materials documents and papers whatsoever sent to the agents and relating to the business of the company (Other than correspondence between the company and the agents) which the agents may have in their possession or under their control and also deliver up to the company upon the termination of this agreement all separate books of account and records relating to the agency kept. in accordance with Clause 3(j) of this agreement.

(b) Upon such termination the agents shall forthwith deliver up to the company or otherwise dispose of as the company directs the goods and any parts thereof which are in their control.

11 Save as hereinbefore otherwise provided any notice required to be en hereunder shall be sufficiently given to the agents if forwarded by registered post recorded delivery service railex telex or telegraph to the last known postal address of the agents in the agency district shall be sufficiently given to the company if similarly forwarded to registered office. Every notice shall be deemed to have been received and given at the time when in the ordinary course of transmission it should have been delivered of the address to which it was sent.

12 The waiver by the company of any breach of any term of this agreement shall not prevent the subsequent enforcement of that term and shall not be deemed a waiver of any subsequent breach.

13 This agreement embodies the entire understanding of the parties and there are no promises terms conditions or obligations oral or written express or implied other than those contained herein.

Reference is made in cl 2(c) to the Direct Sales Act 1993 which, under s 18 requires a person negotiating door-to-door sales to produce identification card and authority card. Under reg 11 of the Direct Sales Regulations 1993, the authority card shall contain various particulars of the said person and must also contain the signature of the authorised person of the company who issued the authority card. Sales to a body corporate are exempted from the operation of the Direct Sales Act 1993.

It appears that the parties had already dealt with each other prior to the date of the distribution agreement because in August 1994 Alliance was already offered the sole distributorship for East Malaysia and Brunei for a trial period from 1 August 1994 to 28 February 1995 and this was accepted by Alliance on 25 July 1994. During the month of August 1994 Pelangi dealt with Sinar Suci Sdn Bhd (Suci) and Syarikat Dewan Pustaka Setia (Dewan) concerning the supply of the products to the Education Department in the event of a successful tender by the two entities. These goods were delivered by Pelangi in November 1994.

On 14 November 1994, Pelangi wrote to Alliance to say that they had instructed their lawyers to have the distribution agreement amended to provide for an adjustment to the price to take into account additional items

to be included in the products. The proposed amendment was conveyed to Alliance by Pelangi's letter dated November 18 in these terms:

[To Alliance, etc ...]

Amendments to agreement

We refer to the agreement signed on 1 October 1994.

We confirm that both of us are agreeable to vary the aforesaid agreement by replacing Clause 3(e) therein with the following Clause —

Clause 3(e)

'will not sell the goods to any person (or body corporate or incorporate) except at the full list price, namely Pack 1 for RM399 and Pack 2 for RM555 without providing for any discounts in any form. In the event that the company decides to vary the contents of Pack 1 or Pack 2 or both or either of them or to amalgamate or restructure the same into one or many packs, it shall have the rights to do so at their sole discretion and to set such list price thereof as they deem fit. The company shall inform the agents in advance of such changes, at least two months prior to the intended change and shall permit the agents to purchase the goods in its current original packing at the price of RM399 for Pack 1 and RM555 for Pack 2 for a period of one year from the date of the agreement for the special purpose of its promotion with Bank Simpanan Nasional.

For the avoidance of doubt, it is agreed and declared that the agents shall not be permitted to undertake any changes to the contents or packaging of the goods but shall be permitted to price the goods at a sum which is not more than 110% of such prevailing full list price as set by the company. In the event that the agents wish to produce any gift items or special promotional premiums to be given away to its customers, the agents must obtain the prior written consent of the company.'

Kindly indicate your agreement to the above change by signing and returning to us the duplicate copy of this letter.

[By Pelangi, etc ...]

Alliance did not agree to the proposed amendment and said so in a letter dated 12 April 1995. Prior to that, disagreement had arisen.

On 3 January 1995 Alliance claimed the sum of RM50,730 against Pelangi for the sales to Suci and Dewan referred to earlier and asked to be supplied with 215 sets of the products costing RM50,692.50 and that the cost be off-set against their claim for the RM50,730. This was followed by a further claim by Alliance of RM728 for 11 sets of the products sold by Pelangi to the Miri Education Department.

It was only on 9 March 1995 that Pelangi responded. The contents of their letter are reproduced here:

[To Alliance etc ...]

Magic Box Collections

We refer to your letter dated 3 January 1995 and are now placing our reply on record, as you have requested us to do so.

Foremost, we wish to reiterate the firm stand taken throughout by us that there is no merit at all to any claim by you.

A The troublesome provisions contained in cl 5(a) were inserted at your suggestion (and not ours). We enclose herewith a copy of your letter dated 27 September 1994 which sets out your request for the amendment to our agreement. You will note that our agreement did not originally contain any such improper provision.

B Having stated the above, we will now want to state our position clearly, so that our business relationship will have an opportunity to be long-standing and fruitful instead of having any unnecessary misunderstanding exist between you and ourselves. In this connection, we take some comfort in the fact that through the assistance of Gabriel, we have had some useful discussions recently.

C In our recent meeting, we take heart that you agree with us that there is a misunderstanding due to the inaccurate drafting and usage of cl 5(a). The provision to prevent price under-cutting was meant for the direct sales/open market customers and was not to apply to Government tenders.

D You will know that the tenders took place many months prior to the signing of our Distribution agreement dated 1 October 1994. At that point in time, you had not come into the picture and did not have any right to determine our prices prior to that date or with whom we dealt with. After that date, we appointed you as our distributor in East Malaysia and we had and still have every intention of dealing with you, subject of course, to such reservations and the terms which are stipulated in our agreement.

E By cl 5(a) of the agreement, we had reserved our rights to deal in Governmental and Ministry Contracts. We note further that the 'penalties' stipulated and put in by you is not a true reflection or calculation of the possible losses, in the event of a possible breach by either party and is quite meaningless. This is more so when there has been no effort whatsoever on your part to procure this tender!

F In view of your letter and the special inserted by you (which proviso is not requested for by all of our many other distributors) our directors have recently met for a discussion and have reviewed the whole agreement, including credit provisions in cl 6(b) and the termination provisions in cl 7(d) and cl 8 of the agreement. For the present, it was decided that the matter could have arisen due to a misunderstanding and if possible ought to be resolved quickly and amicably to both our mutual benefits.

G However, a firm stand had to be taken to reject the unfounded claim made by you and we shall treat the orders stated in your letter as unplaced, unless you take the usual steps in regards to the payment therefor. Kindly do the needful in respect of the payment to enable us to forward the goods to you.

H For the above and other reasons which we do not wish to go into for the present, the claim made by you is wholly erroneous and your allegations as stated in your letter are denied. Please note that no admission or waiver whatsoever ought to be construed at all in relation to any part of this letter.

On a last note, whilst fully reserving all our legal rights, please submit immediately your quarterly year report, which you were required to (but did not), under cll 2(e) and 3(k) of the agreement.

Yours faithfully,

I (Sgd) Sum Kown Cheek

The events culminated in the termination by Pelangi of the distribution agreement by a letter dated 29 April 1995 which is in these terms:

[To Alliance ...]

Notice of Termination under clause 8(L) of Distribution Agreement

We refer to the above agreement.

We regret to note that —

(1) Despite our repeated requests for you to submit your quarterly year report as provided for under cll 2(e) and 3(k), you hove completely failed to do so and is in breach of our agreement

(2) Save for the initial order of 150 sets of Pack 1 and 2 made by you on 4th August 1994, no other orders whatsoever have been placed by you and no marketing endeavours seem to have been made by you at all. This is despite your written promise of on annual minimum quantity order of 7,000 packs each i.e. an average of 583 sets of Pack I and 583 of Pack 2 per months and your undertakings under cl 3 of the Distribution agreement.

We hereby give you the requisite four (4) months' NOTICE in writing required under cl 8(1) of the Distribution agreement to terminate the Distribution agreement dated 1 October 1994.

Please note that in the meantime, you are still required to furnish the aforesaid quarterly year reports immediately and fulfill your legal obligations as regards the minimum purchases under he agreement. We hereby further full reserve our rights to claim against you for the losses in sales due to the inactivity in your part,

For your information, our preliminary estimate of our said losses in sales are as follows:

[Etc ...]
Loss of Sales ... RM1,875,087

We now refer to our letter dated 12 April 1995 and we regret to note that you have now refused to honour your oral understanding to amend the Distribution agreement and to the price revision for the newly-packaged Pack 1 (which packs in a lot of additional items).

In the premises, as is your indicated wish and subject to our aforesaid Notice, we will for now continue to supply you with the 'old Pack 1 at the original price of RM399 and let the present unsatisfactorily drafted agreement stand as it is.

[Signed on behalf of Pelangi]

Pelangi followed up with another letter of June 24 to demand for the quarterly sales return and for minimum purchases of the products. Alliance responded in September by forwarding the first and second quarterly returns which were dated respectively April 12 and July 7. The third quarterly return dated October 2 was forwarded on the same day. I turn now to the disputes as to the facts starting with those raised in the High Court suit and then with those of the two lower court summonses.

Factual disputes

These disputes can be gathered from the pleadings and I will deal with them in the order set out in para 9 of the statement of claim but those of para 9.i and iii will be considered together.

(1) *Whether Alliance had, despite repeated requests, failed to provide quarterly report*

It is common ground that the quarterly report referred to is the sales report mentioned in cl 2(e), the 'reports returns and other information relating to sales' mentioned in cl 3(k) and the 'data base of customers who have made purchases' of the distribution agreement. However, the pleading of Pelangi referred to 'particulars of potential customers' while 3(k) talked of customers who had made purchases. That allegation of para 9.iii should fail.

Kua Boo Kui, a director of Alliance, testified that a sales report dated 24 October 1994 was sent to Pelangi by Postlaju. He also testified that he had also prepared three quarterly reports dated respectively 12 April 1995, 7 July 1995 and 2 October 1995, which reports were received by Pelangi as they appeared in the bundle of documents prepared by Pelangi for use in court. Though it was suggested that because Kua Boo Kui was running a mini-post office and was therefore in a position to issue the receipt as showing the posting of the sales report, there is no evidence to suggest that he had done that. The problem with this case is that there was no disclosure or discovery by either party, not till a day or two before the trial, thus giving plenty of opportunity for manufacturing documents if the parties were minded to do so. However, as I have said earlier, there must be evidence or circumstances to support that conclusion which are not present. As for the reports dated April 12 and July 7, they were only sent to Pelangi vide a letter dated 1 September 1995 after three reminders from Pelangi. There is no controversy regarding the October 2 report.

The allegation of the pleading of Pelangi is that Alliance 'failed to provide quarterly report'. It is not the case of Pelangi that Alliance had failed to provide them within any specific time laid down by the distribution agreement. Consequently, the time for delivering such report was not an issue but only whether such was delivered. Mr Kilat Beriak, learned counsel for Pelangi, also did not address the court as to when those documents ought to have been delivered which, apart from the manner of the pleading, made me conclude that the issue here is whether those reports were delivered. On the evidence that I have gone through, I am of the view that the reports were delivered to Pelangi.

(2) *Whether Alliance failed to reach a minimum quantity of sales and/or purchases*

It is not in dispute that by the time of the termination letter dated April 29 Alliance had not purchased the quantity of the products spelt out under cl 2(e) which is 7,000 packs each of the different packs within the first year. But Alliance argued that by April 29, the first year had not yet expired since only seven months had elapsed. Pelangi argued that the target of 7,000 packs each was to be achieved 'through orders made at regular intervals'. This was elaborated to mean orders 'in small batches of not less than 100 sets at regular intervals of at least one to two months'. What, then, is the meaning of cl 2(e)? For ease of reference, I reproduce the said clause here:

> The agents agree to make the following minimum quantity of purchases from the company and to provide a sales report without any delay every three months

Period	Minimum Quantity
Within 1st year	7,000 Pack I & 7,000 Pack 2
Within 2nd year	12,000 Pack I & 12,000 Pack

It is agreed that an initial minimum order of 100 units of Packs I & 2 (combined) shall be placed and that each of the subsequent orders shall be in quantities of at least 100 units of Packs I & 2 (combined).

I have been referred to my decision in *Syarikat Sinar Sahabat v Nam Thye Co (LD) Sdn Bhd* [1995] BLJ 60 and was asked to follow it with regard to the approach, set out therein, which the court takes concerning the construction of a commercial contract. I would summarise what I have said there (including the authorities laying down the principles) in the following manner:

(1) the parties cannot give direct evidence of what their intention was (*Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989);

(2) evidence of the surrounding circumstances known to the parties at the time when they make the contract is admissible in all cases to place the contract in its correct setting even where there is no ambiguity apparent on the face of the document (*Lewison on Interpretation of Contracts*, p 44; *Prenn v Simmonds* [1971] 3 All ER 237); and

(3) such evidence is restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

In fact, such an approach was already taken in the earlier case of *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633. Thus, the court must place itself in thought in the same factual matrix as that in which the parties were when construing the meaning of the distribution agreement. I turn now to 'the surrounding circumstances' leading to the execution of the distribution agreement, some of which I have already narrated earlier. Mr Kilat has contended that cl 2(e) is supposed to provide for Alliance to purchase the products by monthly instalment. Leaving aside the question of quantity, learned counsel had referred to the letters exchanged between the parties prior to the execution of the distribution agreement as showing that intention of the parties. The first of these is a letter dated 12 July 1994 from Pelangi to Alliance offering the sole distributorship for the trial period which I have earlier referred to and which Alliance accepted. One of the terms is: 'Reordering shall be a minimum of 10 sets (Pack 1 and/or Pack 2'. But it does not speak of the time-frame nor its regularity in which the reordering is to be made. The reply of Alliance dated July 25 supplied the missing detail because in this reply Alliance talked in terms of ordering in two-monthly intervals of 300 packs each which Pelangi accepted. The circumstances show that the parties had dealt with each other on the basis that there should be an order at two-monthly intervals. Clause 2(e) in fact is clear that periodical order is expected with a minimum quantity per each order of 100 packs. But that does not resolve the dispute. What has to be determined is whether cl 2(e) can be construed

as preventing any bulk order of say 14,000 packs in a single order. Throughout the distribution agreement, the emphasis is on a minimum quantity of sales. It would be ridiculous to expect a clause in such agreement as to restrict the maximum quantity when the more would be the better in terms of profit. That is why there is no such limitation. Furthermore, there is also no time limit set in which each order placed by Alliance must be met by Pelangi. Mr Kilat had referred to certain evidence of Sum Kown Cheek, the managing director of Pelangi, as being relevant to the construction of cl 2(e), viz:

> Suppose to spread out the order throughout the whole year since 100 units figure given. Boxes are bulky and if 7,000 packs within a year, lot of space to store, need time to transport from Hongkong and New Zealand, help in finance planning. If I [work out] 7,000 packs a year spread out in 3 quarters should get 1,749 each of Pack 1 and Pack 2. If work on costing side Alliance has to pay RM780,000 for every quarter to purchase these packs ... Fundamental and critical to agreement. Minimum order in stages, spread out monthly.
>
> Q How many per month
>
> A 583 if take pro rata of 7,000 divided by 12.
>
> ...
>
> Q Did you expect Alliance to make order at one time.
>
> A No. Expect them to make order over period, if not quarterly at least one month or two month. Also stated minimum of 100 each, economy of scale to send from West to East Malaysia.

None of those evidence, even assuming that they can be considered as surrounding circumstances, can support the construction that there cannot be any substantial quantity in one order. They all go towards establishing minimum order required. As for the reason given by Sum Kown Cheek that a single large order would require transport from New Zealand and Hongkong and large storage space and that it would cost Alliance a lot, that is not an honest statement for the following reasons. The products consist of materials which can be easily duplicated and Pelangi is permitted under cl 15 of its agreement with Magic Box Distribution (Asia) Ltd to make copies. Documents produced by Pelangi in the form of quotations from companies that provided duplication services suggest that such was the practice of Pelangi. The duplication of 1,200 pieces of tapes can be made and delivered within 24 hours of any order placed. Pelangi does not produce or order the products unless they have firm orders and there is no question of large storage space being required. I do not see any problem in meeting a single order of say 14,000 packs when Pelangi is under no time constraint to meet the order. Therefore, those evidence is of no help to Pelangi's case that cl 2(e) prohibits any bulk order in a single order. The evidence of Kua Boo Kui that he had planned to buy 150 packs per week or about 500 packs per month which had resulted in the insertion of cl 2(e) is similarly of no assistance because it does not provide the answer whether it was the intention of the parties that you should not order in bulk in a single order if the need arises.

I am of the view, looking at the surrounding circumstances and at the whole of the distribution agreement, that cl 2(e) does not prohibit bulk order in a single order. This means that Alliance has the right to order the whole quantity of the products in the twelfth month of the first year or in any previous month. This means too that when considering whether Alliance had breached cl 2(e), the last day for compliance is the last day of the twelfth month of the currency of the distribution agreement, which would be 30 September 1995.

(3) *Whether the distribution agreement can be terminated by four months' notice*

In so far as there is a provision for termination is concerned there is no dispute because cl 8(1) does provide for such a termination and it is in this term:

> 8 (1) Either party may terminate this agreement at any time by giving to the other party four (4) month's notice in writing sent by registered post or recorded delivery service to the registered office of the company or he agents as the case may be.

Mr Baru contended that Pelangi had waived their right to terminate the distribution agreement under that clause since they had chosen to terminate for the reasons given in the April 29 letter. It will be recalled that in that letter Pelangi had alleged various breaches of the distribution agreement which I have already dealt with. However, apart from that, the letter also says:

> We hereby give you the requisite four (4) months' NOTICE in writing required under Clause 8(1) of the Distribution agreement to terminate the Distribution agreement dated 1 October 1994.

Clearly then the termination was also under cl 8(1).

When contending that Pelangi had waived their right, Mr Baru had referred to *Mohamad Selan v PB Secuirities Sdn Bhd* [1992] 1 MLJ 762. In that case the plaintiff was engaged as a remisier by the defendant and was held to be an agent of the defendant. A term of the agency was that the defendant could suspend the plaintiff from trading at any time at its absolute discretion without assigning any reason whatsoever. When suspending the plaintiff the defendant gave reasons for doing so which were held not valid and that the suspension was wrongful. Damages were ordered to be assessed. The court there said this at p 774:

> On 20 December 1990, the defendant wrote to the plaintiff to suspend the plaintiff 'from trading with immediate effect'. In that letter, the defendant gave reasons for suspending the plaintiff from trading. The defendant said that as on 1 December 1990 the security deposit of the plaintiff was $37,423.13, and that the losses suffered by the defendant arising from 'the sales of stolen scrips by Cheong Seng Tatt' was $69,135.45. The defendant asked the plaintiff to 'make good the potential loss of $69,135.45'.
>
> It is, therefore, clear that the defendant, knowing and being fully aware of its rights under cl 4 of the remisier's agreement to suspend the plaintiff 'without assigning any reason whatsoever', intentionally or voluntarily abandoned that right when it gave its reasons for suspending the plaintiff. In

A other words, the defendant had waived its rights not to give reasons for suspending the plaintiff from trading.

The facts of the present case are obviously different. The distribution agreement provides for summary termination of the distribution agreement under cl 7 and for termination with four months' notice under cl 8(1). The B April 29 letter relied on the alleged breaches as well as on notice for termination. Though estoppel and waiver were not pleaded by the defendant there was no objection to that issue being raised. What are the acts or omissions of Pelangi which Alliance said amounted to a waiver of Pelangi's right to terminate by notice under cl 8(1)? This must be determined as was said in *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & C Anor*, at pp 662-663:

> It was argued by counsel for the plaintiff that there was a waiver of the requirement under the joint-venture agreement as to the giving of vacant possession of the lands concerned by the plaintiff when D1 proceeded with the construction work before the plaintiff yielded vacant possession of the site.
>
> In this context, it is useful to bear in mind what Isaacs J said in *Craine v* D *Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305:
>
> > ... we are bound here to limit the word 'waiver' to its own strict legal connotation. 'A waiver must be an intentional act with knowledge' (per Lord Chelmsford LC in *Earl of Darnley v (Proprietors etc) of London, Chatham & Dover Railway* (1867) LR 2 HL 43 at p 57). First, 'some distinct act ought to be done to constitute a waiver' (per Parke B in *Doe* E *d Nash v Birch* [1836] 1 M & W 402 at p 406 and per Williams J in *Perry v Davis* (1858) 3 CB NS 769 at p 777); next, it must be 'intentional', that is, such a either expressly or by imputation of law indicates intention to treat the matter as if the condition did not exist or as if the forfeiture or breach of condition had not occurred; and, lastly, it must be 'with knowledge', an essential supported by many authorities, from Pennant's F case (1596) 2 Co Rep 171 at p 173 and down to *Matthews v Smallwood* [1910] 1 Ch 777. 'Waiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions (see per James LJ in *Pilcher v Rawlins* (1872) 7 Ch App 259 at p 268 et seq). It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and G position of the person who is said to have waived, in order to see whether he has 'approbated so as to prevent him from reprobating' — in English terms, whether he has elected to get some advantage to which he should not otherwise have been entitled, so as to deny to him a later election to the contrary (see per Lord Shah in *Pitman v Crum Ewing* [1911] AC 217 at p 239). His knowledge is necessary, or he cannot be said to have approbated or elected.

H

Mr Baru did not elaborate how the act of stating the alleged breaches in the April 29 letter constitutes waiver of the right to terminate by notice when by the same letter it is also asserted that the termination was by notice under cl 8(1). If anything, the intention of Pelangi was made very clear that they were exercising their right, rather than waiving their right, under cl 8(1) to I terminate the distribution agreement by notice.

Therefore, though the alleged breaches could not be established, nevertheless the distribution agreement was lawfully terminated by Pelangi

giving four months' notice under cl 8(1). The distribution agreement came to an end on 29 August 1995. With that I turn now to the claim of Alliance and the issues resulting therefrom.

(4) *Whether Pelangi had prematurely terminated the distribution agreement*

In so far as reliance on the breaches of the distribution agreement for termination is concerned, I have already concluded that that cannot be had because Alliance was not in breach. However, I was also of the view that the distribution agreement was validly terminated by notice. Therefore, there is no question of premature termination.

(5) *Whether Pelangi had failed to supply the authority card required by the Direct Sales Act 1993*

It was contended by Mr Kilat that Pelangi 'was not obliged to give Alliance authority cards'. This contention flies in the clear words of cl 2(c) which specifically states that Pelangi 'shall issue, prepare and endorse the necessary authority cards pursuant to Direct Sales Act 1993'. Furthermore, Pelangi through their marketing manager knew before the execution of the distribution agreement that Alliance represented by Kua Boo Kui was running a mini-post office, in the gas and insurance business all of which gave Alliance a large customer base consisting of individuals rather than corporations. This must have been the reason for the provision of the authority card so that door-to-door sales can be conducted. The fact that Alliance sales would be largely based on direct-selling was also asserted by Pelangi in their letter of 9 March 1995.

It was also contended that the authority cards were sent to Alliance. Lee Kheng Hon, the production manager of Pelangi, testified that he had caused to be printed the cards and he referred to an invoice dated 1 November 1994 to show that the cards had in fact been printed. The invoice referred to 2,000 cards with two sizes. He said he had sent 100 cards to Alliance on 3 October 1994 but they were found to be too big and he later sent another set with smaller size. He produced a page from a book which he said is his personal record showing the despatch of the cards. He said he sent the cards without filling in the details. Ainaridah binti Abdullah, a personal assistant of the director of Pelangi, testified that she had sent the cards upon being instructed by Lee Kheng Hon. She added that Lee Kheng Hon had signed the cards. The cards, according to her were sent by courier but she could not produce documents to substantiate it on the ground that the file relating to it was lost two years ago, that is in 1997. Alliance denied receiving the cards. These actions were commenced in 1995 and 1996 by which time the parties would have been told the need to preserve all documents pertaining to this case. There is no evidence that Pelangi was not told this duty. That being the case, why were those documents, if they existed, not kept or delivered to their advocates in the face of the allegation already made in the pleadings that Pelangi did not give to Alliance the cards. It cannot be such a coincidence that every thing relating to the despatch of the cards, including perhaps the covering letter, is lost while everything else relating to this case appears to be available. The courier company

A concerned could have been called to establish the despatch of the cards but was not. The cards must contain the particulars laid down by the Direct Sales Regulations 1993 which I have already referred to but this was admitted by Pelangi not to have been done. Thus, it is inconceivable that something so important as an authority card would be left in such a state. In any event, to qualify to be such a card, it must contain the particulars. B Therefore, it is my view that the cards were not despatched and I am, for the reasons stated, not inclined to accept the evidence of Lee Kheng Hon and Ainaridah bte Abdullah on this point.

This means Pelangi was in breach of the distribution agreement when it failed to supply the authority cards to Alliance. What Alliance requested C was cards for only six persons whose names were stated in their 24 October 1994 letter and this request was repeated in their 12 April 1995 letter. Therefore, whatever damage suffered would be the result of the failure to issue the cards to the six persons. Alliance should at least produce evidence what sales these six persons could have procured if the cards had been issued to them. But Alliance produced no such evidence and I am not sure D what damages Alliance had suffered that could be attributed to this breach of the distribution agreement. Alliance did not even produce evidence that they have sold to corporations which would not require the cards so as to demonstrate their ability to sell for the purpose of supporting an argument that they could have made certain sales. That they requested only cards for six persons is testimony to a very small market area which it is proposed to E cover and to sell to. The past record of Alliance does not show that Alliance was able to sell any appreciable quantity. Their future plan is unknown as no evidence was adduced as to what these six persons had or could have achieved. In the end, I am compelled to conclude that evidence to establish the damages which could come from these six persons was not adduced. F This means Alliance should fail in its counterclaim in Suit 88.

(6) *Whether Pelangi had acted in 'changing the packaging contents midstream' causing 'lots of difficulties' in Alliance's market strategy*

The short answer to that question is that Pelangi had proposed an amendment to the distribution agreement which was in the power of G Alliance to reject and Alliance had in fact rejected. There was no change in the packaging at all. The proposal cannot amount to a breach of the distribution agreement. There is therefore no substance in this allegation of Alliance.

(7) *Supplying to the Education Department through Hung Tat Bookshop Sdn* H *Bhd 330 units of Magic Box Pack 2 at a discount price of RM335 per pack*

This is the subject matter of a claim in summons case 334. Since the sale to Hung Tat Bookshop took place on 13 November 1995 which is a date after the distribution agreement was, as I have concluded earlier, validly terminated on 29 August 1995, this claim must fail since Alliance cannot I claim any right under the distribution agreement after it was lawfully terminated and the supply of the products at a discount was after the distribution agreement had ended.

(8) *Whether Pelangi supplied to (a) Sinar Suci Sdn Bhd 285 units of Magic Box Pack 1 at a discount price of RM338 per unit and (b) Dewan Pustaka Setia 285 units of Magic Box Pack 2 at a discount price of RM438*

This matter concerns the claim under Summons No 310. That there were those sales at a discount by Pelangi to Sinar Suci Sdn Bhd and Dewan Pustaka Setia is not disputed. Pelangi maintained that the sales took place before the execution of the distribution agreement, that is 1 October 1994 while Alliance said it was after that date. Those sales were pursuant to tenders which were called for on 1 August 1994 but acceptance by the Education Department or the Treasury of the tenders of these two entities was only conveyed to them on or after 1 November 1994. That, submitted Mr, Baru, would be the date that a contract is concluded. I agree with that submission and it is trite law which requires no further elaboration.

It is also contended by Pelangi that cl 3(e) only applies to prevent sales at a discount by Alliance and not by Pelangi. Clause 3(e) reads:

> 3 [Alliance] hereby undertake and agree with [Pelangi] that they will at all times during the continuance in force of this agreement observe and perform the terms and conditions set out in this agreement and in particular —
>
> ...
>
> (e) will not sell the goods to any person (or body corporate or unincorporate) except at the full list price, namely Pack I for RM399 and Pack 2 for RM555 without providing for any discounts in any form.
>
> ...

That cl 3(e) appears only to restrict the sale by Alliance at a discount and it does not provide for any corresponding duty, not in that clause anyway, on the part of Pelangi. However, when Alliance alleged a breach of the distribution agreement it did not restrict itself to cl 3(e) but made only a sweeping and general allegation of the breach of the distribution agreement. A corresponding duty on the part of Pelangi can be found in cl 5(a) which is in these terms:

> 5 [Pelangi] reserves to itself the rights notwithstanding anything to the contrary herein contained —
>
> (a) to continue to sell and supply the goods to the customers in the agency district for purchases through co-operatives or under circumstances where the payments are through deductions (eg Angkasa, Moccis Trading, etc) and for all Governmental or Ministry purchases and no right to commission shall accrue to the agents in respect of any such sale provided that the selling price must be identical to those sold within the agency district by the agents. In the event that the company or the agents sell the goods at a discount, such damages at an amount equivalent to the discount given shall be credited or paid to the agents or the company, as the case may be.
>
> For the avoidance of doubt, it is hereby declared and declared that both the company and the agents are permitted to sell and supply the goods to the customers in the agency district from KOPERKASA, Government clubs and Bank Simpanan Nasional.

By that clause, either party will have to pay the other if a sale of the products is at a discount and an amount equivalent to the discount should be paid by the offending party to the other. This clause was in the mind of Mr Kilat when he submitted on the question of damages though he did not expressly refer to it. Learned counsel submitted firstly that the stipulated sum cannot be recovered unless Alliance can prove it has suffered damages, citing *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd* [1994] 1 MLJ 553. It was further contended that in any event Alliance could only sell at the price that was sold by Pelangi to the two entities if Alliance wanted that deal in which event Alliance would be obliged to pay Pelangi the discount, which is provided under cl 5(a) though learned counsel did not say so.

As for *Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd*, I do not see its relevance since the claim of Alliance is not for loss of profit but for the stipulated amount in cl 5. In this regard I would have thought the case of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (FC) would be in point with regard to the proposition that damages must still be proved if the stipulated sum is to be recovered. That case recognized that there are cases which the court would find it difficult to assess damages or reasonable compensation as opposed to those which could be done according to settled rules. Nevertheless, the Federal Court held, that if there is actual loss or damage which the evidence establish and it is not too remote, the court should award a reasonable sum for the plaintiff. One example of a case being difficult to assess the damages given by the Federal Court is the case of *Chaplin v Hicks* [1911] 2 KB 786 which concerned a failure to give an opportunity to Chaplin, one of 50 actresses, to be interviewed for an employment. The Court of Appeal rejected the argument that only nominal damages should be allowed because Chaplin only had a one in four chance of being successful in the interview.

In the present case, I am of the view that Alliance lost the opportunity to supply the products to the two entities. But I am of the view that the present case stands in a similar if not stronger position than that of Ms Chaplin. Though it was argued that the two entities would not have bought the products at the prices which Alliance was obliged to sell and thus Alliance would not derive any profit, there is no evidence to support that contention of Pelangi. There was nothing to prevent the two entities tendering at a higher price if Pelangi or Alliance had quoted the products to them at the non-discount prices. The prices stipulated under the distribution agreement are respectively RM399 and RM555 for which Alliance gets a discount of 50% which means its profit would be half of the price. If Alliance was to sell 285 packs for each of the two packs they would have reaped a profit of RM135,945 (RM56,857.50 + RM79,087.50). If Pelangi had not given any discount, both Pelangi and Alliance would have the opportunity of securing the contract to supply to the Education Department through the two entities. Therefore, it can be said that Alliance had lost that opportunity but since a sum has been stipulated in cl 5 as being payable in the event of its breach and that sum being lower than would otherwise have been the loss of profit, Alliance is only entitled, under s 75

of the Contracts Act 1950, to the stipulated sum which works out to be RM50,730 being the amount of the discount allowed by Pelangi and which Pelangi has to pay to Alliance under cl 5.

As for the damage, I am of the view that Alliance had lost the opportunity to sell and profit from such sale. That clearly is the damage. However, I agree with Mr Kilat, the loss is not the amount stipulated in cl 5. Alliance was obliged to obtain the products at prices fixed under the distribution agreement and to sell also at fixed prices. Thus, the difference between the two would constitute the damage Alliance had suffered.

Conclusions

For Suit 88 the claim of Pelangi and the counterclaim of Alliance are dismissed with no order as to costs. As for Summons 310, there will be judgment for Alliance against Pelangi for the sum of RM50,730 together with statutory interests and costs. Summons 344 is dismissed with costs to Pelangi.

Order accordingly.

Reported by Jafisah Jaafar